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6 Attorneys for Plaintiff
7 PATTY BERNE

8 * *Defendants' counsel listed after the caption*

9
10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 PATTY BERNE,
13 Plaintiff,
14 v.

15 SKATES ON THE BAY;
16 RESTAURANTS UNLIMITED, INC.
17 dba SKATES ON THE BAY; CITY OF
BERKELEY; and DOES 1-10,
Inclusive,

18 Defendants.

Case No. C10-5335 PJH

Civil Rights

**CONSENT DECREE AND
[PROPOSED] ORDER AS TO
INJUNCTIVE RELIEF AND
DAMAGES ONLY**

19 MARK S. ASKANAS, Esq. (SBN 122745)
20 DYLAN B. CARP, Esq. (SBN 209443)
21 JACKSON LEWIS LLP
199 Fremont Street, 10th Floor
22 San Francisco, California 94105
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23
24 Attorneys for Defendants
25 SKATES ON THE BAY and RESTAURANTS
UNLIMITED, INC. dba SKATES ON THE BAY

26 ZACH COWAN, City Attorney (SBN 96372)
27 MARK J. ZEMBSCH, Deputy City Attorney (SBN 127901)
2180 Milvia Street, Fourth Floor

28 CONSENT DECREE & ORDER AS TO
INJUNCTIVE RELIEF & DAMAGES ONLY

Case No. C10-5335 PJH

SACASES\S\SKATES\PLEADINGS\Consent Decree\Berne Consent Decree & Order 20120215 Revisions (FINAL).doc

Berkeley, CA 94704
Telephone: 510/981-6998
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mzembbsch@ci.berkeley.ca.us

Attorneys for Defendant
CITY OF BERKELEY

PETER J. LINN, Esq. (SBN 178697)
BISHOP-BARRY-DRATH
Watergate Tower III
2000 Powell Street, Suite 1425
Emeryville, CA 94608
Telephone: 510/596-0888
Facsimile: 510/596-0899
plinn@bishop-barry.com

Attorneys for Defendant
CITY OF BERKELEY

1. Plaintiff PATTY BERNE filed a Complaint in this action on November 24, 2010, to obtain recovery of damages for her alleged discriminatory experiences, alleged denial of access, and alleged denial of her civil rights, and to enforce provisions of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and California civil rights laws against Defendants SKATES ON THE BAY; RESTAURANTS UNLIMITED, INC. dba SKATES ON THE BAY; CITY OF BERKELEY; and DOES 1-10, INCLUSIVE (together sometimes "Defendants"), relating to the condition of Defendants' public accommodations as of September 27, 2010, and allegedly continuing. Plaintiff has alleged that Defendants violated Title III of the ADA and sections 51, 52, 54, 54.1, 54.3 and 55 of the California Civil Code, and sections 19955 *et seq.* of the California Health & Safety Code by failing to provide full and equal access to their facilities at 100 Seawall Drive, Berkeley, California (sometimes the "Restaurant").

1 Defendants have filed Answers denying liability and asserted Affirmative
2 Defenses.

3 2. Plaintiff and Defendants (together sometimes the "Parties")
4 hereby enter into this Consent Decree and Order for the purpose of resolving
5 injunctive relief and damages aspects of this lawsuit without the need for
6 protracted litigation. Defendants' sole purpose in entering into this Consent
7 Decree is to help resolve this action without protracted litigation and expense.
8
9 Defendants deny any violations, fault, or liability, including liability for any
10 claimed fees or expenses. The reference or lack of reference in this Consent
11 Decree to any claims in the report of Plaintiff's consultant shall not constitute
12 evidence of the validity or invalidity of such claims. The Parties agree that the
13 liability for all claims alleged in the Complaint is denied by Defendants.
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18 **JURISDICTION:**

19 3. The Parties to this Consent Decree and Order agree that the
20 Court has jurisdiction of this matter pursuant to 28 U.S.C. section 1331 for alleged
21 violations of the Americans with Disabilities Act of 1990, 42 U.S.C. sections
22 12101 *et seq.* and pursuant to supplemental jurisdiction for alleged violations of
23 California Health & Safety Code sections 19955 *et seq.*; Title 24, California Code
24 of Regulations; and California Civil Code sections 51, 52, 54, 54.1, 54.3, and 55.
25
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1 4. In order to avoid the costs, expense, and uncertainty of
2 protracted litigation, the Parties to this Consent Decree and Order agree to entry of
3 this Consent Decree and Order to resolve all claims regarding injunctive relief and
4 damages raised or which could have been raised in the Complaint filed with this
5 Court. Accordingly, the Parties agree to the entry of this Order without trial or
6 adjudication of any issues of fact or law concerning Plaintiff's claims for injunctive
7 relief and damages.
8
9

10 WHEREFORE, the Parties to this Consent Decree hereby agree and
11 stipulate to the Court's entry of this Consent Decree and Order, which provides as
12 follows:
13
14

15 **SETTLEMENT OF INJUNCTIVE RELIEF:**
16

17 5. This Order shall be a full, complete, and final disposition and
18 settlement of Plaintiff's claims against Defendants for injunctive relief that have
19 arisen out of the subject Complaint.
20

21 6. The Parties agree and stipulate that the required work will be
22 performed in compliance with the standards and specifications for disabled access
23 as set forth in the California Code of Regulations, Title 24-2, and Americans with
24 Disabilities Act Accessibility Guidelines ("ADAAG"), unless other standards are
25 specifically agreed to in this Consent Decree and Order. In any instance(s) where
26
27

1 Title 24-2 and ADAAG conflict, the Parties agree that the more strict regulation
2 (i.e. that providing more access) shall apply.

3 a) **Required Work (SKATES ON THE BAY and**
4 **RESTAURANTS UNLIMITED, INC. dba SKATES ON THE BAY):** The
5 required work agreed upon by Defendants SKATES ON THE BAY and
6 RESTAURANTS UNLIMITED, INC. dba SKATES ON THE BAY is described
7 in the report of Barry Atwood to be completed by SKATES ON THE BAY and
8 RESTAURANTS UNLIMITED, INC. dba SKATES ON THE BAY, attached
9 hereto as **Attachment A**, Items 2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.1.5, 2.1.6, 2.2.1, 2.2.2,
10 2.2.3, 2.2.4, 2.2.5, 2.3.1, 2.3.2, 2.3.4, 2.3.5, 2.4.1, 2.5.1, 2.5.2, 2.7.1, 2.7.2, 2.7.4,
11 2.7.5, 2.8.1, 2.9.1, 2.10.4, 2.10.5, 2.10.6, 2.10.8, 2.10.9, 2.10.10, 2.10.11, 2.10.12,
12 2.10.13, 2.10.15, 2.10.18, 2.10.19, 2.11.1, 2.11.2, 2.11.3, 2.11.4, 2.11.5, 2.11.6,
13 2.11.7, 2.11.9, 2.11.10, 2.11.11, and 2.11.12.

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Defendants SKATES ON THE BAY and RESTAURANTS
UNLIMITED, INC. dba SKATES ON THE BAY also agree to conduct regular
training for all of its employees regarding how to recognize and accommodate the
needs of persons with physical disabilities, including without limitation,
maintaining accessible paths of travel within the Restaurant.

b) **Required Work (CITY OF BERKELEY):** The
required work agreed upon by Defendant CITY OF BERKELEY includes the

following:

- i) Restripe the parking lot to include six (6) ADA compliant handicap accessible parking spaces, 2 to be van-accessible;
- ii) Create a new/resurfaced ADA compliant accessible route from the new handicap spaces to and through the planter area immediately west of the parking lot;
- iii) Resurface the pedestrian walkway that crosses the street located between east parking lot and the curb of the Restaurant so as to be an ADA accessible route;
- iv) Increase the size of the ramp at the curb of the restaurant to meet current ADA size and slope requirements; and
- v) The two spaces to the north of the Restaurant have been substantially modified by the CITY OF BERKELEY to be ADA compliant, including one van accessible space.

c) **Timing of Required Work:** Defendants SKATES ON

THE BAY and RESTAURANTS UNLIMITED, INC. dba SKATES ON THE

BAY will complete the work described above in paragraph 6.a. by May 1, 2012. Defendant CITY OF BEREKELY will complete the work described above in paragraph 6.b. by July 30, 2012. In the event that unforeseen difficulties prevent Defendants from completing any of the agreed-upon required work, Defendants or their counsel will notify Plaintiff's counsel in writing within 15 days of discovering the delay. Defendants or their counsel will notify Plaintiff's counsel when the required work is completed, and in any case will provide a status report no later than 120 days from the entry of this Consent Decree and every 60 days thereafter until the work is completed.

d) Defendants will make reasonable good faith efforts to obtain permits and authorizations that may be required under local law, ordinance, or other applicable law in order to accomplish the modifications required under this Order. If a city or other applicable state or local authority does not provide the permits or authorizations in a timely manner, and such delay impacts Defendants' ability to make any of the modifications set forth in the Order within any of the time periods set forth herein, the applicable time period(s) for Defendants to make the modification(s) at issue shall be automatically extended by the period of the delay.

e) Defendants agree to maintain the accessibility of all features of the subject premises pursuant to state and federal law.

1 7. Plaintiff, for herself and her heirs, successors, and anyone else
 2 who may purport to have an interest by and through Plaintiff, further agree that no
 3 claim will be made in the future for equitable or monetary relief or remedial
 4 measures to be undertaken as a result of any alleged discrimination and/or other
 5 wrongful conduct by Defendants related to the allegations in Plaintiff's Complaint
 6 in this case, and releases each of the Released Parties from any such equitable or
 7 monetary relief claims arising out of Plaintiff's visit to the subject premises from
 8 the beginning of time to the date that this agreement is executed by Plaintiff.
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13 **DAMAGES, ATTORNEY FEES, LITIGATION EXPENSES AND COSTS:**

14 8. The parties have also reached an agreement regarding Plaintiff's
 15 claims for damages. Defendants shall pay to Plaintiff a total of twenty-five
 16 thousand, five hundred dollars and no cents (\$25,500.00) for Plaintiff's alleged
 17 damages for emotional distress and civil rights violations, with payment to be
 18 made to "PAUL L. REIN IN TRUST FOR PATTY BERNE." Defendants agree to
 19 deliver full payment of Plaintiff's \$25,500 damages to the Law Offices of Paul L.
 20 Rein, 200 Lakeside Drive, Suite A, Oakland, CA 94612 within 30 days after they
 21 receive this Consent Decree signed by Plaintiff and her counsel. The parties have
 22 not resolved Plaintiff's claims for attorney fees, litigation expenses, and costs.
 23 These issues will be the subject of further negotiation and/or litigation. The parties
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1 jointly stipulate and request that the Court not dismiss the case, as these significant
2 issues remain unresolved.

3

4 **ENTIRE CONSENT DECREE AND ORDER:**

5

6 9. This Consent Decree and Order constitute the entire agreement
7 between Plaintiff on the one hand, and Defendants on the other hand, on the
8 matters of injunctive relief and damages only. The issues of attorney fees,
9 litigation expenses, and costs are specifically excluded and shall be the subject of
10 further negotiation and/or litigation. No other statement, promise or agreement,
11 either written or oral, made by any of the Parties or agents of any of the Parties that
12 is not contained in this written Consent Decree and Order shall be enforceable
13 regarding the matters of injunctive relief or damages described herein as between
14 Plaintiff on the one hand and Defendants on the other hand. This paragraph does
15 not apply to Defendants vis-à-vis each other.

16

17 10. This Consent Decree is executed without reliance upon
18 representation by either the Parties or any of their representatives.

19

20

21 **CONSENT DECREE AND ORDER BINDING ON PARTIES AND
22 SUCCESSORS IN INTEREST:**

23

24 11. This Consent Decree and Order shall be binding on Plaintiff,
25 Defendants, and any successors in interest. Defendants have a duty to so notify all

1 such successors in interest of the existence and terms of this Consent Decree and
 2 Order during the period of the Court's jurisdiction of this Consent Decree and
 3 Order.
 4
 5

6 **RELEASE AND WAIVER OF CIVIL CODE SECTION 1542 AS TO**
 7 **INJUNCTIVE RELIEF AND DAMAGES ONLY:**

8 12. Plaintiff understands and agrees that there is a risk and
 9 possibility that, subsequent to the execution of this Consent Decree and Order, she
 10 will incur, suffer or experience some further loss or damage with respect to the
 11 lawsuit that is unknown or unanticipated at the time this Consent Decree and Order
 12 is signed. Except for all obligations required in this Consent Decree and Order, the
 13 Parties intend that this Consent Decree and Order apply to all such further loss by
 14 Plaintiff with respect to the lawsuit, except those caused by Defendants subsequent
 15 to the execution of this Consent Decree and Order. Therefore, except for all
 16 obligations required in this Consent Decree and Order, this Consent Decree and
 17 Order shall apply to and cover any and all claims, demands, actions and causes of
 18 action by Plaintiff with respect to the lawsuit, whether the same are known,
 19 unknown or hereafter discovered or ascertained, and the provisions of Section
 20 1542 of the California Civil Code are hereby expressly waived. Section 1542
 21 provides as follows:
 22
 23

24 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
 25

**WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
EXIST IN HIS OR HER FAVOR AT THE TIME OF
EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR
HER MUST HAVE MATERIALLY AFFECTED HIS
SETTLEMENT WITH THE DEBTOR.**

This waiver applies to the injunctive relief and damages aspects of this action only and does not include resolution of Plaintiff's claims for attorney fees, litigation expenses and costs.

13. Except for all obligations required in this Consent Decree and
9
10 Order – and exclusive of the referenced continuing claims for attorney fees,
11 litigation expenses and costs -- Plaintiff on behalf of her agents, representatives,
12 predecessors, successors, heirs, partners and assigns, releases and forever
13
14 discharges Defendants and all their officers, directors, shareholders, subsidiaries,
15 joint venturers, stockholders, partners, parent companies, employees, agents,
16 attorneys, insurance carriers, heirs, predecessors, and representatives from all
17
18 claims, demands, actions, and causes of action of whatever kind or nature,
19 presently known or unknown, arising out of or in any way connected with the
20 lawsuit. The Restaurant and the City do not waive or release, but instead explicitly
21 preserves, their right to seek contribution, apportionment, indemnification, and all
22 other appropriate relief from each other in connection with this Lawsuit and
23
24 settlement thereof.

1 **TERM OF THE CONSENT DECREE AND ORDER:**

2 14. This Consent Decree and Order shall be in full force and effect
3 for a period of twenty-four (24) months after the date of entry of this Consent
4 Decree and Order by the Court, or until the injunctive relief contemplated by this
5 Order is completed, whichever occurs later. The Court shall retain jurisdiction of
6 this action to enforce provisions of this Consent Decree and Order for twenty-four
7 (24) months after the date of entry of this Consent Decree and Order by the Court,
8 or until the required work contemplated by this Order is completed and payment
9 for attorney fees, litigation expenses and costs is made in full, whichever occurs
10 later.

14 **SEVERABILITY:**

15 15. If any term of this Consent Decree and Order is determined by
16 any court to be unenforceable, the other terms of this Consent Decree and Order
17 shall nonetheless remain in full force and effect.

21 **SIGNATORIES BIND PARTIES:**

22 16. Signatories on the behalf of the Parties represent that they are
23 authorized to bind the Parties to this Consent Decree and Order. This Consent
24

1 Decree and Order may be signed in counterparts and a facsimile signature shall
2 have the same force and effect as an original signature.
3
4

5 **MISCELLANEOUS:**

6 17. Each of the Parties agrees to execute any and all documents
7 necessary to carry out the terms and provisions of this Consent Decree.
8

9 18. Each of the Parties has carefully read each and every term of
10 this Consent Decree and has received advice of counsel as to the nature and extent
11 of each of the terms and provisions hereof.
12

13 19. Plaintiff and Plaintiff's Counsel warrant that Plaintiff is not a
14 Medicare beneficiary as of the date of this release and therefore no conditional
15 payments have been made by Medicare. Plaintiff will indemnify, defend and hold
16 Defendants and Chartis harmless from any and all claims, liens, Medicare
17 conditional payments and rights to payment, known or unknown.
18

19 20. This settlement is based upon a good faith determination of the
20 parties to resolve a disputed claim. The parties have not shifted responsibility of
21 medical treatment to Medicare in contravention of 42 U.S.C. Sec. 1395y(b). The
22 parties resolved this matter in compliance with both state and federal law. The
23 parties made every effort to adequately protect Medicare's interest and incorporate
24 such into the settlement terms.
25
26

1 **NOTICE AND OPPORTUNITY TO CURE:**

2 21. In the event Plaintiff believes any Defendant has not complied
3 with any term of this Consent Decree, Plaintiff's counsel will so inform Defendant
4 by providing a detailed, written explanation of the alleged non-compliance of this
5 Agreement. Notice to Defendant SKATES ON THE BAY; RESTAURANTS
6 UNLIMITED, INC. dba SKATES ON THE BAY shall be given to Vicki Medak,
7 Vice President of Human Resources, Restaurants Unlimited, Inc., 411 First Ave S.
8 Suite 200, Seattle, WA 98104. Notice to Defendant CITY OF BERKELEY shall
9 be given to Mark J. Zembsch, Esq., Berkeley City Attorney's Office, 2180 Milvia
10 Street, Fourth Floor, Berkeley, CA 94704. Defendants shall thereafter have sixty
11 (60) days to cure the alleged non-compliance of this Agreement. If Plaintiff still
12 believes Defendant is in non-compliance, Plaintiff and Defendant shall meet and
13 confer in good faith to try to resolve the dispute. If the meet and confer is unable
14 to resolved the dispute, Plaintiff may seek Court enforcement of the terms and
15 conditions of the Agreement regarding the issue or issues under such dispute.
16 Plaintiff's ability to enforce the Consent Decree shall expire at 24 months after the
17 date of entry of the Consent Decree by the Court.

18 **END OF PAGE.**

19 **SIGNATURES CONTINUE ON THE NEXT PAGE**

20 **AND ORDER IS AT THE END OF THE DOCUMENT.**

1

2 Dated: February 22, 2012 PLAINTIFF PATTY BERNE

3 *Patricia A. Berne*
4 *Patty Berne*

5 PATTY BERNE

6

7 Dated: February , 2012 DEFENDANT SKATES ON THE BAY

8

9

10 By: _____

11

Print name: _____

12

Title: _____

13

14

Dated: February , 2012 DEFENDANT RESTAURANTS UNLIMITED,
INC. dba SKATES ON THE BAY

15

16

By: _____

17

Print name: _____

18

Title: _____

19

20

March 29
Dated: February , 2012

DEFENDANT CITY OF BERKELEY

21

By: *Christine Daniel*

22

Print name: *Christine Daniel*

23

Title: *Interim City Manager*

24

25

26

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27

//

28

CONSENT DECREE & ORDER AS
TO INJUNCTIVE RELIEF ONLY

Case No. C10-5335 PJH

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1

2 Dated: February 22, 2012 PLAINTIFF PATTY BERNE

3

Patricia A. Berne
Patty Berne

4

PATTY BERNE

5

6

7 Dated: February 22, 2012 DEFENDANT SKATES ON THE BAY

8

9 By: Vicki L. Medell

10

11 Print name: Vicki L. Medell

12

Title: Vice President-Human Resources

13

14

Dated: February 22, 2012 DEFENDANT RESTAURANTS UNLIMITED,
INC. dba SKATES ON THE BAY

15

16

17 By: Tim McNamee

18

19 Print name: Tim McNamee

20

Title: CEO

21

22

Dated: February , 2012

DEFENDANT CITY OF BERKELEY

23

By: _____

24

Print name: _____

25

Title: _____

26

27

//

28

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CONSENT DECREE & ORDER AS
TO INJUNCTIVE RELIEF ONLY

Case No. C10-5335 PJH

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1 APPROVED AS TO FORM:
2

3 Dated: February 21, 2012
4

5 LAW OFFICES OF PAUL L. REIN
6

7 
8

9 By PAUL L. REIN, Esq.
10 Attorneys for Plaintiff
11 PATTY BERNE
12

13 Dated: February 29, 2012
14

15 BERKELEY CITY ATTORNEY
16 
17

18 By MARK J. ZEMBSCH
19 Attorneys for Defendant
20 CITY OF BERKELEY
21

22 Dated: February , 2012
23

24 BISHOP BARRY DRATH
25

26 By PETER J. LINN
27 Attorneys for Defendant
28 CITY OF BERKELEY
29

30 Dated: February , 2012
31

32 JACKSON LEWIS LLP
33

34 By DYLAN CARP
35 Attorneys for Defendants
36 SKATES ON THE BAY and
37 RESTAURANTS UNLIMITED, INC. dba
38 SKATES ON THE BAY
39

40 CONSENT DECREE & ORDER AS
41 TO INJUNCTIVE RELIEF ONLY
42

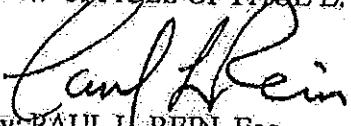
43 Case No. C10-5335 PJH
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1 APPROVED AS TO FORM:

2 Dated: February 22, 2012

3 LAW OFFICES OF PAUL L. REIN

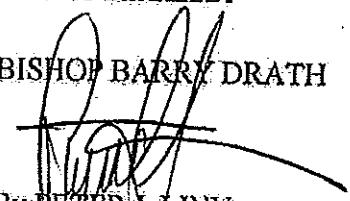
4 
5 By: PAUL L. REIN, Esq.
6 Attorneys for Plaintiff
7 PATTY BERNE

8 Dated: March 29, 2012

9 BERKELEY CITY ATTORNEY


10 11 12
13 By MARK J. ZEMBSCH
14 Attorneys for Defendant
15 CITY OF BERKELEY

16 Dated: March 30, 2012

17 BISHOP BARRY DRATH


18 19 20
21 By PETER J. LINN
22 Attorneys for Defendant
23 CITY OF BERKELEY

24 Dated: February , 2012

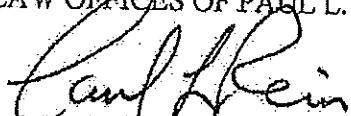
25 JACKSON LEWIS LLP


26 27 28
29 By DYLAN CARP
30 Attorneys for Defendants
31 SKATES ON THE BAY and
32 RESTAURANTS UNLIMITED, INC. dba
33 SKATES ON THE BAY

1 APPROVED AS TO FORM:

2 Dated: February 22, 2012

3 LAW OFFICES OF PAUL L. REIN

4 

5 By: PAUL L. REIN, Esq.
6 Attorneys for Plaintiff
7 PATTY BERNE

8 Dated: February , 2012

9 BERKELEY CITY ATTORNEY

10
11 By MARK J. ZEMBSCH
12 Attorneys for Defendant
13 CITY OF BERKELEY

14 Dated: February , 2012

15 BISHOP BARRY DRATH

16 By PETER J. LINN
17 Attorneys for Defendant
18 CITY OF BERKELEY

19 Dated: February 22, 2012

20 JACKSON LEWIS LLP

21 

22 By DYLAN CARP
23 Attorneys for Defendants
24 SKATES ON THE BAY and
25 RESTAURANTS UNLIMITED, INC. dba
26 SKATES ON THE BAY

27
28 CONSENT DECREE & ORDER AS
TO INJUNCTIVE RELIEF ONLY
Case No. C10-5335 PJH

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ORDER

Pursuant to stipulation, and for good cause shown, IT IS SO ORDERED.

Dated: March 30, 2012

Honorable P. J. V. L. HAMILTON
United States [Signature] IT IS SO ORDERED

